Supreme Court, U.S.
FILED
MAR 25 2004
OFFICE OF THE CLERK

No. 03-6696

IN THE

Supreme Court of the United States

YASER ESAM HAMDI and ESAM FOUAD HAMDI,
as Next Friend of Yaser Esam Hamdi,
Petitioners,

v.

DONALD RUMSFELD, Secretary of Defense, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, U.S. REPRESENTATIVES JOE BARTON, WALTER JONES, AND LAMAR SMITH, AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Daniel J. Popeo
Richard A. Samp
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Thomas V. Loran
William T. DeVinney
(Counsel of Record)
Pillsbury Winthrop LLP
1133 Connecticut Ave., NW
Washington, DC 20036
(202) 775-9800

Date: March 24, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether the President has authority as Commander in Chief and in light of Congress's Authorization for Use of Military Force, Pub.L.No. 107-40, 115 Stat. 224, to seize on a foreign battlefield and detain a United States citizen based on a determination by the American military that he is an enemy combatant who: affiliated with a Taliban military unit, received weapons training, and was captured when his Taliban unit surrendered to Northern Alliance forces with which it had been engaged in battle in Afghanistan.

2. Whether the appeals court provided Petitioner with an adequate hearing regarding the military's determination that he is an enemy combatant.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTERESTS OF THE *AMICI CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. THE PRESIDENT'S COMMANDER-IN-CHIEF POWERS AUTHORIZE HIM TO DETAIN HAMDI AS AN ENEMY COMBATANT REGARDLESS OF HAMDI'S CITIZENSHIP 9

A. Hamdi's Alleged U.S. Citizenship Does Not Negate the President's Authority to Detain Him as an Enemy Combatant 14

B. The President Is Not Required to Release Hamdi Now That He Is Outside the Field of Battle 15

II. HAMDI HAS BEEN PROVIDED AN ADEQUATE OPPORTUNITY TO CONTEST HIS DETENTION 17

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Cases:

Brown v. United States,
12 U.S. (8 Cranch) 110 (1814) 11, 12, 13
Colepaugh v. Looney,
235 F.2d 429 (10th Cir. 1956),
cert. denied, 352 U.S. 1014 (1957) 10, 14
Ex Parte Quirin,
317 U.S. 1 (1942) ..... *passim*
Ex parte Milligan,
71 U.S. (4 Wall.) 2 (1866) 16
Gilligan v. Morgan,
413 U.S. 1 (1973) 18
Hirabayashi v. United States,
320 U.S. 81 (1943) 9
Hirota v. MacArthur,
338 U.S. 197 (1948) 9, 13
In re Territo,
156 F.2d 142 (9th Cir. 1946) 8, 14, 16
INS v. St. Cyr,
533 U.S. 289 (2001) 17
Johnson v. Eisentrager,
339 U.S. 763 (1950) 8, 10, 19
Kansas v. Crane,
534 U.S. 407 (2002) 22
Korematsu v. United States,
323 U.S. 214 (1944) 20, 21
Martin v. Mott,
25 U.S. (12 Wheat) 19 (1827) 23
The Prize Cases,
67 U.S. (2 Black) 635 (1862) 13, 18

Page

United States v. Curtiss-Wright Export Corp.,
299 U.S. 304 (1936) 13, 18, 23
United States v. Macintosh,
283 U.S. 605 (1931) 9
United States v. Salerno,
481 U.S. 739 (1987) 22
Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 10

Statutes and Constitutional Provisions:

U.S. Const., art. I 18
U.S. Const., art. I, § 8 12
U.S. Const., art. I, § 8, cl. 9 12
U.S. Const., art. II 8, 10, 18, 23
U.S. Const., art. II, § 2 ..... 7, 9
U.S. Const., art. III 18

Alien Enemy Act of 1798, ch. 66, § 1, 1 Stat. 577
(now codified at 50 U.S.C. § 21) 12

Authorization for Use of Military Force (AUMF),
Pub. L. No. 107-40, 115 Stat. 224 (2001) ..... *passim*

Page

Miscellaneous:

Michael Beattie and Lisa Yonka Stevens, *An Open Debate on United States Citizens Designated as Enemy Combatants: Where Do We Go From Here?*, 62 MD. L.REV. 975 (2003) 11

Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 11

Lieber Code of 1863 11

Pamela Constable, "U.S. Launches New Operation in Afghanistan," *Washington Post*, March 14, 2004, at A22 3

BRIEF OF WASHINGTON LEGAL FOUNDATION, U.S. REPRESENTATIVES JOE BARTON, WALTER JONES, AND LAMAR SMITH, AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal and state courts to ensure that the United States government is not deprived of the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted sub nom., Rasul v. Bush*, No. 03-334 (U.S., dec. pending); *Rumsfeld v. Padilla*, No. 03-1027 (U.S. dec. pending); *Sosa v. Alvarez-Machain*, No. 03-339 (U.S., dec. pending); *Demore v. Kim*, 123 S. Ct. 1708 (2003); *Zadvydas v. Davis*, 533 U.S. 678 (2001). WLF also filed a brief in this matter when it was before the court of appeals.

The Honorable Joe Barton, the Honorable Walter Jones, and the Honorable Lamar Smith are United States Representatives from Texas, North Carolina and Texas, respectively. They strongly support the efforts of the Executive Branch to protect the American people by taking

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief. The parties have consented to the filing of this brief; letters of consent have been lodged with the Court.

aggressive steps to defeat terrorist organizations that have declared war on the United States. All three supported the joint resolution adopted by Congress on September 18, 2001, Pub. L. 107-40, which authorized the President to use "all necessary and appropriate force" to defeat those organizations; they believe that the joint resolution unquestionably authorizes the President to detain enemy combatants (both citizens and aliens) who take up arms against the United States in support of those organizations.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici believe that one of the best protections our nation has against terrorist attacks is a strong Executive Branch possessing broad decision-making powers with regard to the war on terror, as contemplated by the framers of our Constitution. Specifically, when our military leaders determine that an individual should be detained as an enemy combatant, the Judiciary should show substantial deference to that decision. The Judiciary is ill-equipped to make independent findings as to matters of foreign policy, especially those involving overseas combat. Petitioner's citizenship entitles him to ask the courts to protect him from arbitrary or discriminatory detention; it does not entitle him to *de novo* review of military determinations.

STATEMENT OF THE CASE

Al Qaeda is a network of terrorist groups that has conducted attacks throughout the world. Those attacks had all

occurred outside of the United States until September 11, 2001, when al Qaeda coordinated the series of attacks on the United States that killed approximately 3,000 people.

The President and Congress promptly responded to ensure that the United States would not be subject to further attacks. Congress declared that al Qaeda continued to represent an "unusual and extraordinary threat to national security," and recognized that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Authorization for Use of Military Force, Pub. L. No. 107-40, Sec. 2(a), 115 Stat. 224 (2001) ("AUMF"). Congress endorsed the President's use, in his capacity as Commander in Chief of the armed forces, of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." *Id.*

The President thereafter ordered the United States military to enter Afghanistan to attack al Qaeda forces, as well as forces of the ruling Taliban which had supported and provided refuge for al Qaeda. The Afghanistan operation, named operation Enduring Freedom, began on October 7, 2001, and hostilities continue to this day.[2]

During the course of Enduring Freedom, the military captured thousands of enemy combatants allied with the Taliban or al Qaeda. Military leaders determined that many of those captured troops must be detained throughout the course

---

[2] *See, e.g.*, Pamela Constable, "U.S. Launches New Operation in Afghanistan," *Washington Post*, March 14, 2004, at A22.

of the hostilities to prevent those troops from rejoining enemy forces.

One of the captured enemy troops was Petitioner Yaser Esam Hamdi. Declaration of Michael H. Mobbs ("Mobbs Decl.") ¶ 4, J.A. 149. Based on conversation with Hamdi and others, the military has concluded that Hamdi went to Afghanistan prior to September 11, 2001 to train with and, if necessary, fight for the Taliban. *Id.* at 148, ¶ 3. He remained there when the United States began operation Enduring Freedom. *Id.* The military has further determined that while battling Northern Alliance forces near Konduz, Afghanistan, Hamdi surrendered to the Northern Alliance along with his entire Taliban unit. *Id.* at 149, ¶ 4. The military has determined that at the time of his surrender, Hamdi was disarmed of his Kalishnakov assault rifle. Id.[3]

Northern Alliance forces later turned Hamdi over to U.S. custody. Following its interrogation of Hamdi, the American military determined that Hamdi met its criteria for detention as an enemy combatant. *Id.* at 149, ¶¶ 6-7. He was transferred to Guantanamo Bay, Cuba in January 2002. After military officials learned in April 2002 that he had been born in Louisiana, Hamdi was transferred first to Virginia and then to the Naval Brig in Charleston, South Carolina, where he has been held without charges for nearly two years.

On June 11, 2002, Hamdi's father, Esam Fouad Hamdi, filed a next-friend habeas action on behalf of his son in U.S. District Court for the Eastern District of Virginia. The petition alleged that Hamdi is a U.S. citizen and therefore entitled to all

[3] The Kalishnakov rifle is a combat weapon similar to the M-16 used by United States armed forces.

protections of the Constitution, and that his detention without charges or counsel violated the Fifth and Fourteenth Amendments. That same day, before the petition was served on Respondents, the district court appointed the public defender as Hamdi's counsel and ordered that, no later than July 14, 2002, Hamdi was to have unsupervised access to counsel. J.A. 336-37.

The government appealed to the Fourth Circuit, which reversed the district court's order on July 12, 2002. The appeals court held that granting unsupervised access to counsel to someone determined by the American military to be an enemy combatant had "sweeping implications for the posture of the judicial branch during a time of international conflict." *Id.* at 340. The court cautioned that "[t]he executive is best prepared to exercise the military judgment attending the capture of alleged combatants," and that on remand the district court should exercise "deference to the political branches." *Id.* at 341. The appeals nonetheless declined to grant the government's request to dismiss the petition outright, stating:

> Any dismissal of the petition at this point would be [] premature . . . [and] would be summarily embracing a sweeping proposition -- namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so.

Id.

On remand, the government filed a motion to dismiss the petition, supported by a declaration from Michael Mobbs, the Under Secretary of Defense for Policy. J.A. 148-150. The Mobbs Declaration sets forth the factual findings underlying the U.S. military's determination that Hamdi is an enemy

combatant subject to detention for the duration of hostilities. At an August 13, 2002 hearing on the motion, the district judge accepted the government's determination that Hamdi went to Afghanistan to be with a Taliban military unit and that he was armed when captured. J.A. 236. He stated that "[Hamdi] was there to fight. And that's correct." *Id.* at 255. Nonetheless, in an August 16, 2002 order denying the motion, the district judge held that the Mobbs Declaration fell "far short" of supporting Hamdi's detention; he noted, for example, that the declaration did not contend that Hamdi had ever fired his rifle. J.A. 292. He ordered the government to turn over to Hamdi's counsel voluminous materials, including the notes from any interviews with Hamdi. *Id.*

The government again appealed to the Fourth Circuit, which reversed the district court's production order and directed that the petition be dismissed. J.A. 416 - 455. The appeals court held that the Executive Branch possesses broad constitutional authority to undertake military campaigns it deems to be in the national interest, and that that authority includes the power to detain enemy combatants for the duration of hostilities. *Id.* at 426. It further held that because the judiciary is not similarly equipped "to supervise the conduct of overseas conflict," the federal courts properly have "shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs." *Id.* It rejected Hamdi's claim that Congress had adopted legislation purporting to prohibit military detention of uncharged American citizens as enemy combatants.

While acknowledging Hamdi's right to challenge his detention by means of a habeas petition, the appeals court held that the averments of the Mobbs Declaration were sufficient to establish a *prima facie* case that "Hamdi's detention conforms

with a legitimate exercise of the war powers." *Id.* at 443. The court held that in light of the Mobbs Declaration and because Hamdi's petition "place[d] him squarely within the zone of active combat," further "factual inquiry into the circumstances of Hamdi's capture would be inappropriate." *Id.* at 447-48. Accordingly, the court dismissed the petition.

On July 9, 2003, the Fourth Circuit voted 8-4 to deny Hamdi's petition for rehearing.

SUMMARY OF ARGUMENT

One of our nation's greatest protections against foreign threat is the authority vested in the President by Article II of the Constitution to act as Commander in Chief in times of armed conflict. That authority allows the President to handle the exigencies of war largely unencumbered by the deliberative process of the Congress or the evidentiary burdens imposed by the Judiciary.

When, as here, Congress has explicitly endorsed the President's decision to use military force, the courts should be particularly reluctant to second-guess the wisdom of specific military decisions. But even when the Executive Branch is acting on its own to take steps that it views as necessary to promote the national defense, the courts have only a limited role to play in reviewing those actions. The Court has recognized that waging war is the prerogative of the political branches and has shown great deference to the President's actions taken pursuant to the war powers.

Those principles dictate that the Fourth Circuit's decision be affirmed. Congress endorsed the President's exercise of his Commander-in-Chief powers under Article II, Section 2 of the Constitution when it passed the AUMF authorizing him to use

"all necessary force" to wage the war on terrorism and its sponsors. Such a broad delegation of authority must necessarily include the authority to capture and detain enemy combatants. The military necessity of capturing enemy soldiers and detaining them for the duration of hostilities has been recognized since the founding of our nation, and has never been doubted by this Court. As the Fourth Circuit noted, it is well-settled that such detention is necessary to "prevent enemy combatants from re-joining the enemy and continuing to fight against America" and is within the scope of the President's Article II war power. J.A. 425.

That Hamdi may be an American citizen does not affect the President's power to detain him pursuant to Article II. As this Court has held, "Citizenship in the United States of an enemy belligerent does not relieve him from the consequences" of his actions. *Ex Parte Quirin*, 317 U.S. 1, 37 (1942).

Hamdi's claim to citizenship, however, does afford him access to the United States courts to challenge his detention. *Compare In re Territo*, 156 F.2d 142 (9th Cir. 1946) (addressing habeas petition by prisoner of war who was also American citizen), *with Johnson v. Eisentrager*, 339 U.S. 763 (1950) (enemy aliens held overseas are not entitled to judicial review of their detention). *Amici* do not contest that Hamdi, as an American citizen, is entitled to judicial review of his detention as an enemy combatant, nor do *amici* contest that Hamdi has a right to be represented by counsel during that review. Hamdi's right to petition the Judiciary, however, is subject to the limits on the Judiciary's authority under the Constitution to second-guess the President's exercise of his Commander-in-Chief powers. As noted above, the President's war powers permit him to capture and detain enemy combatants. The Mobbs Declaration makes a *prima facie*

showing that Hamdi is an enemy combatant. In the absence of any evidence from Hamdi calling the Mobbs Declaration into question -- and indeed, Hamdi's habeas petition concedes his presence in the Afghanistan war zone -- the Fourth Circuit properly dismissed the petition.

ARGUMENT

I. THE PRESIDENT'S COMMANDER-IN-CHIEF POWERS AUTHORIZE HIM TO DETAIN HAMDI AS AN ENEMY COMBATANT REGARDLESS OF HAMDI'S CITIZENSHIP

The Constitution provides that "the President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." U.S. Const. art. II, Sec. 2. Those Commander-in-Chief powers grant the President "the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war." *Quirin*, 317 U.S. at 26. The President's war power "is not restricted to the winning of victories in the field and the repulse of enemy forces," but "extends to every manner and activity so related to war as substantially to affect its conduct and progress." *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943). *Cf. United States v. Macintosh*, 283 U.S. 605, 622 (1931) ("from its very nature the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law").

The President's war power includes the authority to capture and detain enemy combatants. The detention of enemy combatants is a necessary incident to the conduct of war and falls within the President's prerogatives. *See Hirota v.*

MacArthur, 338 U.S. 197, 215 (1949) (Douglas, J., concurring) ("the capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the Commander in Chief . . . had the final say."). This Court repeatedly has addressed the President's detention of enemy combatants, whether lawful or unlawful, without questioning his authority to do so. *See Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Quirin*, 317 U.S. at 31; *see also Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956), *cert. denied*, 352 U.S. 1014 (1957).

Despite the centuries-long acceptance of the practice of detaining enemy combatants without hearing for the duration of hostilities, Hamdi argues that the President lacks inherent authority under Article II to detain enemy combatants. Hamdi relies principally on *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), to support this argument. *See* Pet. Br. at 38, 39, 44-45. *Youngstown* provides no such support.

In *Youngstown*, the Court addressed President Truman's seizure of the nation's steel mills to prevent their closure during a nationwide steelworkers strike. The President argued that the seizure was proper pursuant to his authority as Commander in Chief because steel production was vital to the nation's security -- steel was needed to produce arms being used in the Korean War. The Court rejected that argument, stating, "Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production." *Youngstown*, 343 U.S. at 587. The Court held that the seizure of private property within the United States to avoid labor strife was too far afield from traditional understandings of "military affairs" to fall within the

President's Commander-in-Chief powers. Nothing in the opinion suggests that those powers do not include the detention of enemy combatants -- an activity at the core of traditionally-accepted military activities.[4]

Hamdi cites *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), for the proposition that the President's power to detain enemy combatants exists only with Congress' prior authorization. Hamdi has misinterpreted *Brown*, which addressed the wartime seizure (by a private citizen who filed a *qui tam* action) of private property belonging to citizens of an enemy nation. After canvassing the law of nations, the Court concluded, "The modern rule would seem to be, that tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated; and in almost every commercial

---

[4] Even assuming, *arguendo*, that the President's war powers did not inherently include the right to detain enemy combatants, Congress granted that authority when it enacted the AUMF. It is inconceivable that in authorizing the President to use "all necessary and appropriate force," Congress did not intend to authorize the detention of enemy combatants. AUMF, § 2(a). Treaties regarding the rules of war have long recognized that waging war will necessarily involve captured combatants. *See* The Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949; The Lieber Code of 1863, available at http://www.civilwarhome.com/liebercode.htm (last visited March 17, 2004). The Lieber Code of 1863 governed the conduct of the Union Army in the Civil War and was used as a model code for many modern war treaties. *See* Michael Beattie and Lisa Yonka Stevens, *Comment: An Open Debate on United States Citizens Designated as Enemy Combatants: Where Do We Go From Here?*, 62 Md. L. Rev. 975, 1001-02 (2003). The AUMF contains no language suggesting that Congress, while otherwise endorsing the President's broad use of military force to battle al Qaeda and its allies, sought to prevent him from engaging in the well-accepted practice of detaining enemy combatants.

treaty an article is inserted stipulating for the right to withdraw such property." *Brown*, 12 U.S. (8 Cranch) at 125. While acknowledging that the United States was not *required* to abide by the law of nations in this respect, the Court indicated that it would not conclude that the U.S. had decided to abandon customary practice without some affirmative indication to that effect. The Court determined that it was up to Congress to make such a decision, citing Article I, Sec. 8 of the Constitution.[5] *Id.* at 126. It further determined that although Congress had authorized the seizure of enemy aliens found within the United States,[6] it had not authorized the seizure of enemy property; and that the declaration of war against England did not, of itself, "authorize proceedings against the persons or property of the enemy found, at the time, within the territory" of the United States. *Id.*

Brown is wholly inapposite; it has nothing to say about the President's use of military power or the detention of enemy *combatants*. It involved the seizure of private property within the United States, and its brief discussion of the seizure of individuals was confined to the seizure of enemy *noncombatants* found within the U.S. at the outbreak of war. Moreover, the Court's decision that private citizens (purporting to act on behalf of the government) had not been authorized by Congress to seize property belonging to enemy aliens and located within the United States was based in large measure on a long-standing international custom disfavoring such seizures. In contrast and as noted above, the long-standing custom with

[5] Article I, Sec. 8, cl. 9 states in part, "Congress shall have power . . . "[to] make Rules concerning Captures on Land and Water."

[6] Alien Enemy Act of 1798, ch. 66, § 1, 1 Stat. 577 (now codified at 50 U.S.C. § 21).

respect to enemy combatants is that they *are* subject to detention for the duration of hostilities.[7]

Nor can Hamdi's interpretation of *Brown* by squared with later decisions of this Court, which have endorsed the President's broad authority over foreign policy and military matters. The Court has held, for example, that in matters relating to foreign affairs, the other branches of government "must often accord to the President a degree of discretion and freedom from statutory restriction" as "he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially this is true in time of war." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). Subsequent decisions have cited *Curtiss-Wright* approvingly on numerous occasions, and have recognized that the President's Commander-in-Chief powers include the power to detain enemy combatants. *See, e.g., Hirota v. MacArthur*, 338 U.S. at 215 (Douglas, J., concurring).

[7] Furthermore, the Court in *Brown* emphasized that its decision was predicated on a finding that the property in question had been off-loaded at New Bedford harbor and was physically located within the United States. *Brown*, 12 U.S. (8 Cranch) at 121. Later decisions make clear not only that enemy property found *outside* the United States is subject to seizure even if it is not within a war zone, but also that the President may order such seizure without explicit congressional authorization. *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) (when the United States is attacked, the President not only is authorized by the Constitution to take appropriate counter measures -- including invoking the laws of war -- but also "is bound to accept the challenge without waiting for any special legislative authority."). The Court held that nonmilitary cargo belonging to citizens residing in Confederate states was properly seized at the President's direction under the laws of war as "enemies' property" regardless that the property was seized on the High Seas and not in any military zone. *Id.* at 674.

A. Hamdi's Alleged U.S. Citizenship Does Not Negate The President's Authority to Detain Him as an Enemy Combatant

That Hamdi may be a United States citizen does not affect the President's right to detain him as an enemy combatant. In *Quirin*, the Court addressed a habeas petition of eight Nazi saboteurs during World War II who were captured, tried, and sentenced by a military tribunal for crimes of war. One of those petitioners was an American citizen. The Court nonetheless found that he was subject to detention and prosecution as an enemy combatant, stating that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences" of his actions. *Quirin*, 317 U.S. at 37.

The federal appeals courts have reached the same conclusion. In *Territo*, the Ninth Circuit addressed the habeas petition of a member of the Italian armed forces during World War II who had been born in the United States. *In re Territo*, 156 F.2d 142 (9th Cir. 1946). He was captured during a battle in Sicily and brought to the United States, where he challenged his detention. The Ninth Circuit rejected the challenge, holding that "all persons who are active in opposing an army in war may be captured" and that there was no legal authority "supporting the contention of petitioner that citizenship in the country of either army in collision necessarily affects the status of one captured on the field of battle." *Territo*, 156 F.2d at 145.

Similarly, the Tenth Circuit rejected the habeas petition of an American citizen convicted by a military tribunal of spying for the German Reich during World War II. *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956). The petitioner contested his classification as an unlawful belligerent and

subsequent trial by a military tribunal. The Tenth Circuit upheld the classification and conviction, holding that "the petitioner's citizenship in the United States does not . . . confer upon him any constitutional rights not accorded any other belligerent under the laws of war." *Id.* at 432.

As noted above, a citizen has more rights than a noncitizen to invoke the jurisdiction of the federal courts for purposes of challenging his detention and contesting his designation as an enemy combatant. But if he is, in fact, an enemy combatant, a citizen is as subject as anyone else to detention for the duration of hostilities.

B. The President Is Not Required to Release Hamdi Now That He Is Outside the Field of Battle

Hamdi argues alternatively that because of his claim to citizenship, the President is authorized to detain him as an enemy combatant only so long as he is within the actual field of battle. Because he has now been moved to South Carolina and has not been charged with a crime, Hamdi claims that he must be released. Pet. Br. 28-35.

Hamdi's claim is without merit. Regardless of the location of Hamdi's detention, the decision to detain him retains its military character. The right to detain enemy combatant without charges derives from the well-established customs of war, not from the happenstance that no civil courts remain open on the battlefield.

This Court addressed a similar argument in *Quirin*. The petitioners, and especially the petitioner who was a United States citizen, argued that they were entitled to a trial in a civilian court because they were captured and detained within the continental United States, in areas far removed from the

battlefield and where courts were open and operating normally. They sought to rely on *Ex Parte Milligan*, which held that a civilian may not be tried by a military tribunal "where the courts are open and their process unobstructed." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866). *Quirin* dismissed the petitioners' arguments by noting that "Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war." *Quirin*, 317 U.S. at 45. Similarly, because the government has determined Hamdi *is* "a part of or associated with the armed forces of the enemy," he can garner no support from *Milligan*.

Seeking to distinguish *Quirin*, Hamdi asserts that *Quirin* stands merely for the proposition that the military may exercise authority over citizens only pursuant to "congressionally authorized military prosecutions of citizens charged with violating the laws of war." Pet. Br. 30. *Quirin* is not so limited; it authorized not only the military prosecution of American enemy combatants but also their detention. *Quirin*, 317 U.S. at 28, 31. Similarly, the petitioner in *Territo* was a U.S. citizen detained as an enemy combatant -- he had fought in the Italian army. The Ninth Circuit upheld his continued detention without charges even after he was brought to the United States as a prisoner of war. The Ninth Circuit noted that he was in the United States and away from the field of battle, as were "thousands" of other prisoners of war, but did not find any reason that he could not be detained. *In re Territo*, 156 F.2d at 146.

Indeed, Hamdi's argument would work an absurd result. The President would have to either detain enemy combatants close to the field of battle and in harm's way, or move them away from the battlefield and risk being ordered by a court to release any prisoner that claimed citizenship. That result bears no relationship to the rationale justifying detention of enemy

combatants: preventing them from returning to their former comrades-in-arms while hostilities continue. That rationale remains just as strong regardless where an enemy combatant is being detained.

II. HAMDI HAS BEEN PROVIDED AN ADEQUATE OPPORTUNITY TO CONTEST HIS DETENTION

Amici strongly support Hamdi's right to seek judicial review of his detention. "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr,* 533 U.S. 289, 301 (2001). Particularly where, as here, Hamdi is being detained without having had the benefit of a military hearing, it is important that he be provided a meaningful opportunity to demonstrate that his detention is wholly arbitrary and/or unjust. For example, he is entitled to -- and received -- *de novo* review of the government's determination that it possessed constitutional and statutory authority to detain American citizens determined to be enemy combatants.

Nonetheless, the Fourth Circuit correctly determined that a deferential standard of review must be applied to the government's determination that Hamdi was a Taliban fighter (and thus an enemy combatant). The Constitution invests Congress with the power to authorize military action and the President with the power to wage war. As the Court explained in *Quirin*:

> The Constitution thus invests the President as Commander in Chief with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all

> laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war.

Quirin, 317 U.S. at 26.

In contrast, Article III of the Constitution grants to the judiciary nothing analogous to the specific powers of war so carefully enumerated in Articles I and II. Accordingly, the Court has shown great deference to the political branches of government when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs. *See, e.g., Curtiss-Wright*, 299 U.S. at 319-20; *The Prize Cases*, 67 U.S. (2 Black) at 670; *Quirin*, 317 U.S. at 25 (noting that acts "by the President in the declared exercise of his power as Commander in Chief of the Army in time of war and of grave public danger are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted"). As the appeals court explained below, deference is required because "the executive and legislative branches are organized to supervise the conduct of overseas conflicts in a way that the judiciary simply is not." J.A. 427. This Court has noted with regard to military affairs:

> It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible - as the Judicial Branch is not - to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence.

Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

Deference is particularly warranted with respect to "enemy combatant" detention decisions because such decisions so directly impact the ability of military commanders to wage war. As the Court held in a related context, "It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his attention from" ongoing military offensives to "the legal defensive." *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950).

Amici submit that the Fourth Circuit adequately balanced the constitutional mandates that, on the one hand, all citizens be provided a meaningful opportunity to contest their detention and, on the other hand, the courts not intrude into military decisions that are beyond their expertise. It did not permit Hamdi's detention to continue without explanation; rather, it insisted that the military provide a detailed account of the bases for its decision to hold Hamdi as a enemy combatant. But particularly in light of Hamdi's concession that he was present on the battlefield in Afghanistan, the Fourth Circuit properly ruled that the determinations set forth in the Mobbs Declaration were sufficient to justify dismissal of Hamdi's petition.

Hamdi insists that the judicial review afforded him by the Fourth Circuit cannot be deemed "meaningful." Pet. Br. 14-20. But tellingly, even now -- two years after his counsel filed a habeas petition on his behalf with the assistance of his father and after having had an opportunity to meet with counsel -- Hamdi has provided this Court with *no* basis for challenging the military's good faith in making the determinations set forth in the Mobbs Declaration. Rather, he rests his challenge to the Fourth Circuit's procedures solely on his supposed right to stand on a general denial of the military's determinations, and

on the Fourth Circuit's rejection of the district court's order granting counsel detailed discovery into military records. Pet. Br. 15. Accepting Hamdi's position would require the courts to abandon the deference they traditionally (and correctly) afford to military decision-making. Under a rule of deference, it is not up to the military to provide admissible evidence to support its determination that Hamdi is a enemy combatant. Rather, once the government has established that it possesses the requisite authority to detain enemy combatants and has submitted a declaration setting forth its bases for determining that a citizen is an enemy combatant, the burden shifts to the petitioner to provide evidence demonstrating that the government is acting in bad faith or that its detention decision is totally arbitrary. Hamdi has not carried that burden, despite being given adequate opportunity to do so.

The reason why Hamdi is entitled to judicial review is not because it is somehow un-American to hold an American citizen without charges; to the contrary, the propriety of such detention is well established when the citizen is an enemy combatant. Rather, judicial review is warranted to guard against the danger of abuse of power by the Executive Branch. It is possible that the Executive Branch may seek to detain its political enemies as "enemy combatants," and *amici* share the concern of all liberty-loving citizens that the judiciary always be on guard against such abuse. But the role of the judiciary should be to guard against clear abuse, not to second-guess the national security decisions of our elected leaders.

Evidence that the government has abused its power would include evidence that Hamdi is being detained based on some racial stereotype. *See Korematsu v. United States*, 323 U.S. 214, 235 (1944) (Murphy, dissenting) (exclusion of defendant from the West Coast was based not on an individual finding of dangerousness, but rather on the unreasonable

assumption that all citizens "of Japanese ancestry must have a dangerous tendency to commit sabotage and espionage."). But Hamdi introduced no evidence of unreasonable racial stereotyping. Moreover, the Mobbs Declaration does not recite generalizations regarding groups of which Hamdi happens to be a member; rather, it recites specific facts regarding Hamdi's actions in support of the Taliban war effort.[8]

Nor has Hamdi cited other evidence suggesting abuse of power. Hamdi has no history of outspoken political opposition to the federal government, so there is no reason to believe he is being retaliated against for his speech. Moreover, *amici* are aware of only one other American citizen being held as an enemy combatant in connection with the current war: Jose Padilla. In the absence of evidence that large numbers of citizens are being detained under circumstances similar to Hamdi's, there is no reason to suspect that the President is detaining Hamdi based on anything other than a considered judgment that Hamdi is, in fact, a Taliban soldier.

The Court has rightly been concerned by government efforts to detain citizens based solely on predictions of future dangerousness and has imposed significant constitutional

---

[8] Nothing in their dissents suggests that the three *Korematsu* dissenters would have had any objection to Hamdi's detention. The dissenters made clear that they would not have objected to evacuation orders directed to persons deemed by military leaders (based on individualized evidence) to be potential saboteurs. Indeed, in his dissent, Justice Jackson went out of his way to make clear that courts had absolutely no basis for second-guessing the soundness of military determinations. He dissented solely because the evacuation orders were based on blatant racial discrimination, not on military considerations, and because he deemed it inappropriate for the Court to attach its seal of approval to such discrimination. *Id.* at 245-48.

restrictions on such detentions. *See, e.g., Kansas v. Crane,* 534 U.S. 407 (2002); *United States v. Salerno,* 481 U.S. 739 (1987). But such cases have not arisen in the military context, where the Constitution demands judicial deference to the decisions of the elected branches of government. More importantly, Hamdi is not being detained based on predictions of future dangerousness; he is being detained in light of a determination that (based on his past conduct) he is a Taliban soldier. Once that determination is made, the laws of war permit the government to detain Hamdi for the duration of the conflict, regardless of whatever evidence Hamdi may present that he does not pose a danger to the American people.

Hamdi is correct that he has not been provided an opportunity to "pick apart" the Mobbs Declaration "piece by piece." But providing him meaningful review does not require providing him such an opportunity. Rather, unless the courts are to get into the business of second-guessing such quintessentially military determinations as who, among those found on a foreign battlefield, should be deemed to have aided the enemy, the courts must limit their review in this case to determining whether, despite the Mobbs Declaration's *prima facie* showing that the military detained Hamdi based on evidence sufficient to determine that he is an enemy combatant, the government has been acting arbitrarily or in bad faith. Because Hamdi has provided no such evidence and has not asked that the case be remanded to provide him with an opportunity to do so, the decision below should be affirmed.

Hamdi is mistaken in contending that the Fourth Circuit's refusal to permit review of the factual bases for his detention, as set forth in the Mobbs Declaration, is unprecedented. This Court has often deferred to the President by refusing to review the factual basis for actions taken pursuant to the war powers.

For example, in *Martin v. Mott*, 25 U.S. (12 Wheat) 19 (1827), Congress had passed a statute authorizing the President to call up the militia in any state or area "whenever the United States shall be invaded, or be in imminent danger of invasion." *Martin*, 25 U.S. (12 Wheat) at 28-29. A citizen who was fined, and had his property seized to satisfy the fine, for failure to serve in the militia, challenged the seizure by claiming that no "imminent danger of invasion" existed to justify the President's call to activate the militia. The Court refused to consider whether an "imminent danger" existed, and held that "the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons." *Id.* at 30. Similarly, in *Curtiss-Wright*, the Court declined to review the President's determination that he had made factual findings sufficient to establish that a ban on arms sales to Bolivia would contribute to the reestablishment of peace in South America. *Curtiss-Wright*, 299 U.S. at 330-31.

The level of factual review urged by Hamdi, and originally ordered by the district court, fails to give proper deference to the President's authority under Article II to conduct military affairs. Any effort by the courts to second-guess the President's military decision to detain Hamdi, in the absence of evidence that he acted arbitrarily or in bad faith, would undermine the separation of powers provided for in the Constitution and would substantially weaken the Executive's authority to provide for the common defense in time of war.

CONCLUSION

Amici curiae respectfully request that the decision of the court of appeals be affirmed.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
Washington Legal Foundation
2009 Massachusetts Ave, NW
Washington, DC 20036
(202) 588-0302

Thomas V. Loran
William T. DeVinney
(Counsel of Record)
Pillsbury Winthrop LLP
1133 Connecticut Ave., NW
Washington, DC 20036
(202) 775-9800

Date: March 24, 2004

39D